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Volume XXVII, Number 4, April, 1950

SECURITY TRANSACTIONS AND THE CONFLICT OF LAWS

ALLEN P. MITCHEM

Assistant Professor, University of Denver College of Law

While the new Certificate of Title Act[1] which was enacted by the Colorado legislature last year has eliminated many of the pitfalls of residents of this state who purchase or otherwise acquire interests in automobiles, it will have little effect in resolving the conflicts between interest acquired as a result of transactions occurring in Colorado and prior interests which arose in another state if the motor vehicles involved were registered in the other state. This conflict of laws problem still remains. This problem, of course, is not confined to interests in automobiles, but it may involve any chattel which is removed from one state to another. Discussion of the problem, however, is usually in terms of automobiles because they are the chattels in which rights have been asserted in most of the decided cases. This is true undoubtedly as a result of the comparative ease with which an automobile may be removed from one state to another.

A hypothetical case may serve to introduce the problem. Jones buys a car in State X either under a conditional sale contract wherein title is retained by the Brown Motor Company (the vendor) until all payments are completed, or by giving the Brown Motor Company a chattel mortgage to secure the unpaid balance, either type of transaction being recognized as valid under the law of State X. Thereafter, without the knowledge or consent of the Brown Motor Company, Jones removes the car to Colorado where interests in the car are asserted by attaching creditors of Jones, or by a subsequent purchaser, mortgagee, or other lien holder, each of whom acquired his interest without notice of the outstanding interest which was created by the out of state security transaction. The issue may be stated as follows: Will the Colorado courts recognize the interest acquired by Brown Motor Company by virtue of the transaction which took place in State X while the car was located in that state?

The issue thus presented should be carefully distinguished from the non-conflicts situation where the original transaction between Jones and Brown Motor Company took place in this state at a time when the car was situated here. In such an event, the Colorado courts should unquestionably determine the rights of the various parties in accordance with the internal law of this state.

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[1] COLO. STAT. ANN., c. 16, § 13 (Supp. 1949). For a summary of this Act, see Hellerstein, *Certificate of Title Law Effective August* 1, 26 DICTA 175 (July, 1949).

COLORADO LAW APPLICABLE IN NON-CONFLICTS SITUATIONS

Before proceeding to an analysis of the conflicts situation presented in the hypothetical problem, it might prove helpful to consider momentarily some of the established rules of Colorado law which would be applied to conditional sales and chattel mortgages which had no contacts outside the state.

While there are significant differences in the nature of the rights which arise between parties to chattel mortgages on the one hand and parties to conditional sale contracts on the other hand,[2] the Colorado courts have held that regardless of whether the instrument used be a conditional sale contract, chattel mortgage, lease, trust deed, or other form, if it is intended to have the effect of a mortgage or lien upon the property, it must be acknowledged and filed for record. If this is not done, the property must be delivered to and remain in the possession of the vendor-mortgagee before his rights will be superior to those of third parties who, without notice, subsequently acquire an interest in the property.[3] While it may be doubted that conditional sales are "intended to have the effect of a mortgage or lien," [4] it is thus established that they do have that effect as to third parties who subsequently acquire rights without notice, and as to such third parties, they are given the effect of absolute or unconditional sales.

It should be noted that the above rules became established in reliance upon statutory provisions [5] no longer applicable to motor vehicles which are subject to the new Certificate of Title Act.[6] However, that Act, which requires the existence of any "mortgage" on a motor vehicle to be noted on the owner's certificate of title or bill of sale in addition to being filed for public record,[7] defines "mortgages" as including "chattel mortgages, conditional sales, contracts, or any other like instrument intended to operate as a mortgage or create a lien on a motor vehicle as security for an undertaking of the owner." [8] It may thus be inferred that the Act dealt only with the method of giving notice and left undisturbed the previous holdings which refused to differentiate between chattel mortgages and conditional sales with regard to the necessity of giving notice to third persons.

THE THEORY OF THE CONFLICT OF LAW RULE

If it be assumed that the above is a correct statement of the internal law of Colorado, it must be conceded that the law of most other states is different, particularly with reference to conditional

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[2] HELLERSTEIN, CHATTEL MORTGAGES IN COLORADO, § 2 (3rd ed. 1940).

[3] Illinois Co. v. Patterson, 91 Colo. 391, 15 P. 2d 699 (1932); Coors v. Reagan, 44 Colo. 126, 96 P. 966 (1908). The chattel mortgage (or conditional sale) will, however, be valid as between the parties thereto, COLO. STAT. ANN., c. 32, § 4 (1935), or as to third parties with actual notice, COLO. STAT. ANN., c. 32, § 5 (1935).

[4] *See* Mr. Justice Butler dissenting in Illinois Co. v. Patterson, 91 Colo. 391, 408, 15 P. 2d 699, 705 (1932).

[5] COLO. STAT. ANN., c. 32, §1 and § 20 (1935).

[6] COLO. STAT. ANN., c. 16, § 13 (18) (Supp. 1949).

[7] *Ibid.*

[8] *Id.* c. 16, § 13(2)(m).

sale contracts, which, in the absence of express statutes to the contrary, are recognized as valid even against third persons without notice. As was pointed out by the dissenting justices in a Colorado case decided in 1932,[9] in the purchase of personal property, the rule of caveat emptor ordinarily applies. Thus, a lessee of chattels cannot, as against the lessor, pass title by sale thereof even to a bona fide purchaser who has no notice of the lessor's title. Nor can a bailee or agent by his wrongful sale pass title to a third person so as to cut off the interest of the bailor or principal.

Consequently, it may be supposed that under the law of the hypothetical State X, there is no statutory requirement for recording the conditional sale contract or chattel mortgage, or it may be supposed that there is such a requirement and that the instrument has been recorded in accordance with the law of State X. In either case, the result is the same, i.e. Brown Motor Company's interest is protected and superior to that of creditors of Jones, at least so long as the automobile remains in State X.

Upon the removal of the car to Colorado and upon assertion of rights therein by Jones' creditors or a subsequent vendee, it becomes necessary to choose between the law of State X and of Colorado. Except as a state may have to alter it to meet requirements of statutory or constitutional law, a state may select any choice of law rule which it wishes. However, the foremost objective of conflict of law rules is to prevent the outcome of litigation from varying solely because of the place chosen to institute the suit. This objective is dictated by reasons of fairness to all parties concerned. It will be conceded that this objective is not always attained; nevertheless, it is an objective which should be constantly in mind in the application of any choice of law rule.

There appears to be no constitutional compulsion that either the law of State X or the law of Colorado be applied in the problem at hand. While it has been urged by respectable authority that the state to which the chattel has been wrongfully removed has *no jurisdiction* to divest the owner of his interest in the chattel,[10] such a view has not found general acceptance. If the chattel is in the second state, that state has power over such chattel, and it seems that the second state can apply its own law to determine the interests of persons therein.[11] Nor does the Full Faith and Credit Clause [12] require the choice of State X law, there having been no judicial determination of the rights of the parties in that state.

It appearing that either choice of law is open to the Colorado court, the first step normally taken by the forum (Colorado) is that

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[9] Illinois Co. v. Patterson, 91 Colo. 391, 415, 15 P. 2d 699, 705 (1932).

[10] Beale, *Jurisdiction Over Title of Absent Owner*, 40 HARV. LAW REV. 805 (1927).

[11] *Compare* RESTATEMENT, CONFLICT OF LAWS, § 268 and § 275 (1934) for the suggestion that the interests of the mortgagee or conditional vendor are not divested as a result of any dealings in the second state but that dealings with the chattel in a state into which it is taken without consent of the mortgagee or conditional vendor may result in new liens which have preference over the mortgage or conditional title.

[12] U. S. CONST. ART. 4, § 1.

of *characterization.* This involves a determination of the legal nature of the problem. Is it one of tort, contract, property, etc.? The answer to this question will be determined by reference to the concepts of the forum. The problem at hand concerns interests in property which were created by contract. If the mortgagee or conditional vendor was trying to enforce a personal obligation created by the contract, a court where the action was brought might easily justify the conclusion that the legal nature of the problem was the validity of the contract, in which case the Colorado court would undoubtedly apply the law of the place of contracting,[13] State X.

Where, however, the controversy in the second state involves primarily claims of parties to interests in the chattel, as it does in this hypothetical situation, the courts will characterize the problem as one of property. The governing law then becomes the law of the state where the property was at the time of the transaction.[14] It may thus be seen that when the transaction took place in State X at a time when the property was located in that state, regardless of whether the problem was characterized as one of contracts or of property, the rights of the parties should normally be determined by the law of State X.

While this result is not reached because of any constitutional compulsion and rests upon principles of so-called comity, there is a great deal of merit in the rule. No state other than State X had any concern in the matter at the time the interests of the parties arose.

CONFLICT CASES IN THE COLORADO COURTS

The references to the usual choice of law rules in the preceding paragraphs should not be understood as expressing the choice of law rules usually applied in the Colorado courts. On the contrary, the decided cases in this state seem to indicate that the Colorado law differs in this respect from that of most other states.

The first reported conflicts case wherein this type of problem arose was *Harper* v. *People.*[15] In that case the court upheld the right of a conditional vendor against a domestic attaching creditor, the conditional sale contract having been entered into in Kansas. The court was careful to note a distinction between this conflicts case and an earlier non-conflicts case[16] wherein the conditional sale was made in this state. The court in the *Harper* case stated that wherever the *lex loci contractus* and the situs of the property unite to sustain the validity of the contract, "it may be safely asserted that it is enforceable in the courts of every state where a controversy arises over the title to the property."[17]

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[13] Cockburn v. Kinsley, 25 Colo. App. 89, 135 P. 1112 (1913).
[14] RESTATEMENT, CONFLICT OF LAWS, § 265 and § 272 (1934).
[15] 2 Colo. App. 177, 29 P. 1040 (1892).
[16] George v. Tufts, 5 Colo. 162 (1869).
[17] Harper v. People, *supra* at 179, 29 P. at 1040.

Similar treatment was given in a 1920 case [18] to a chattel mortgage on a truck which, although the sale and mortgage were executed in Colorado, was described in the mortgage as being situated in Nebraska. The chattel mortgage was valid in Nebraska, where it had been recorded, and it was therefore held valid and enforceable in Colorado, even though the facts indicated that the occasional removal to Colorado was with mortgagee's consent.

From these two cases, one might have concluded in 1920 that regardless of the conditions that the internal law of Colorado would have imposed upon the conditional vendor or mortgagee for the protection of his interest, if that interest had arisen as a result of a transaction in this state involving chattels here located, Colorado would respect similar interests which had arisen in a sister state and which were valid by the law of such state.

This seemingly harmonious state of affairs was soon shattered insofar as conditional sales were concerned, however, by the much discussed case of *Turnbull* v. *Cole*.[19] The facts in that case were that defendant's assignor had sold a car to one Keightley in Utah by virtue of a contract reserving to the vendor the right to take possession of the car upon default in payments and to sell it. The contract appeared to impose upon the purchaser an *unconditional* obligation to pay the agreed price; however, under the law of Utah, the contract was regarded as a conditional sale which did not pass title. Utah law did not require the recording of such a contract in order to protect the interest of the vendor. The car was subsequently removed from Utah without the knowledge or consent of the vendor, brought to Colorado, and sold to Bell, who mortgaged it to Cole to secure a note for $600.

In a 4-3 decision sustaining the interest of the subsequent mortgagee, Cole, the Colorado court said:

> . . . Contracts like that here under consideration, reserving a secret lien [20] to the vendor, will not be recognized as leaving title in the vendor, as against interested parties without notice. . . . The contract, though valid in Utah, could not be enforced in this state, because such action would be contrary to public policy, and would result in detriment to the interests of a citizen of this state. Both of these grounds furnish exceptions to the general rule of comity as applied to the enforcement of contracts.

It will be seen that the Colorado court here recognized that the "general rule of comity" would require the enforcement of contracts validly entered into in a sister state. The validity of the grounds for exception will be discussed later.

The case of *Turnbull* v. *Cole* was followed in two subsequent cases [21] wherein the rights of conditional vendors (arising in other states from transactions which, although unrecorded, were valid

[18] Flora v. Julesburg Motor Co., 69 Colo. 238, 193 P. 545 (1920).
[19] 70 Colo. 364, 201 P. 887 (1921).
[20] Emphasis added.
[21] American Equitable Assurance Co. v. Hall, 93 Colo. 186, 24 P. 2d 980 (1933); Commercial Credit Co. v. Higbee, 92 Colo. 346, 20 P. 2d 543 (1933).

by the laws of such states) were denied recognition. On the other hand, in the intervening case of *Mosko* v. *Matthews* [22] the Colorado court gave recognition to the interest of an Oklahoma mortgagee in a car which had been mortgaged in Oklahoma, the chattel mortgage being recorded in that state, and subsequently removed to Colorado without the knowledge or consent of the mortgagee.

Despite the language in these cases which indicated that the interests of the vendors were not recognized because conditional sale contracts create a "secret lien" which is against the public policy of Colorado, whereas the interest of a mortgagee who had recorded his mortgage would be recognized, it was urged that there was a more satisfactory explanation for the different treatment given in the Colorado courts to these two types of transactions. This explanation is well stated in the Colorado Annotations to the Restatement of Conflict of Laws as follows:[23]

> It is submitted that the rule of Turnbull v. Cole should be restricted to cases in which the conditional sale contract is not filed or recorded in the state of the original situs. There is no evidence . . . (that such) . . . contracts were so recorded. The danger of injury to citizens of Colorado is no greater in the case of a conditional sale contract recorded in the state of original situs but not in Colorado than in the case of a chattel mortgage recorded in the same way.

In the more recent case of *Castle* v. *Commercial Investment Trust Corp.*,[24] however, this seemingly logical explanation of the Colorado position was repudiated. There the conditional sale contract which had been executed in New York *was recorded* in New York. The subject of the sale, a car, was later removed to Colorado without the consent of the vendor plaintiff. In holding that a bona fide purchaser in Colorado had a claim superior to that of the New York vendor, the court was content to state that the comity rule does not extend to such a contract as the one there involved. Evidently the court found itself unable to support the position that the plaintiff had a "secret lien" which was repugnant to the public policy of Colorado, the conditional sale contract having been made a public record which was "notice to the world"; however, no other explanation was given for the decision.

The most recent Colorado case [25] dealing with a conditional sale contract entered into in another state shed no light upon the problem here under discussion, for there the Colorado purchaser from the conditional vendee had *actual* notice of the limited interest of the conditional vendee. The court, therefore, recognized the title of the conditional vendor.

CRITIQUE OF THE COLORADO POSITION

From the foregoing discussion, it would seem that the following conclusions could be safely drawn from the Colorado cases:

[22] 87 Colo. 55, 284 P. 1021 (1930).
[23] Annotation to § 272 (1936).
[24] 100 Colo. 191, 66 P. 2d 804 (1937).
[25] Reavis v. Stockel, 120 Colo. ...., 208 P. 2d 94 (1949).

(1) The rights accruing to a mortgagee from a chattel mortgage executed in State X while the chattel was there situated will be recognized in Colorado even as against third parties without notice, provided that the mortgage was recorded in and valid under the law of State X. (2) The rights of the mortgagee in (1) above probably would not be recognized in Colorado if the mortgage was unrecorded in State X (even assuming that such a transaction was valid as against third parties by the law of State X) because of the Colorado abhorrence of "secret liens". (3) The title of a conditional vendor will not be recognized in Colorado as against third parties without notice where the conditional sale was executed in State X while the chattel was there situated even if the contract was recorded in and valid under the law of State X. (4) As between the contracting parties or as against third persons with actual notice, the rights accruing in State X to either a conditional vendor or mortgagee will be recognized in Colorado regardless of whether the contract was recorded in State X, provided such contract was valid according to the law of State X.

The primary quarrel that the writer has with the position of the Colorado courts concerns the second and third statements above, particularly the third. It should be remembered that in all the foregoing discussion, it was assumed that the removal of the chattel to Colorado was without the knowledge or consent of the vendor-mortgagee. The converse situation would clearly call for the result reached by the Colorado courts. The weight of authority is to the effect that, if the removal of the property to the second state *was contemplated* at the time of the contract, the vendor's title will not be protected as against persons who purchase the property in the second state in good faith from the vendee, or as against creditors of the vendee who levy thereon, after such removal, *unless* filed or recorded in the second state as provided by local law.[26] On the other hand, if the removal was not so contemplated, and if removal was without the knowledge or consent of the vendor, the courts in virtually all states, the notable exceptions being Texas,[27] Illinois,[28] and Colorado, afford protection to the vendor's title without the necessity of recording in the second state. The undesirable results of a contrary doctrine are clearly seen in the following passage by Professor Beale, referring to the Texas law, which is similar to that of Colorado:[29]

> It appears to be a regular course of business for a swindler to buy a motor car on credit in California or elsewhere, drive it into Texas, and sell or pledge it there. The original seller is helpless in the face of this practice; and Texas will doubtless continue full of willing bona fide buyers. That this result is most unfortunate from the point of view of commercial practice is clear.

[26] See collection of cases in 25 A.L.R. 1153 at 1158 (1923).
[27] Consolidated Garage Co. v. Chambers, 111 Tex. 293, 231 S.W. 1072 (1921)
[28] Judy v. Evans, 109 Ill. App. 155 (1903).
[29] Beale, *Jurisdiction Over Title of Absent Owner,* 40 HARV. LAW REV. 805, 810 (1927).

The right of Colorado to maintain a public policy against the use of conditional sales contracts in purely local transactions is not open to question. There are other states having a similar local policy; however, even in those states, the position is generally taken that, notwithstanding the local rule on conditional sales, where the contract is entered into in another state in which it is valid and has the effect of reserving title, it may be enforced in the forum, and such reserved rights will be superior to those of a subsequent purchaser from the vendee.[30]

When there is an attempt to apply this doctrine not only to local transactions, but also to the valid transactions in other states, entirely different considerations are present. Mere dissimilarities in the law of the forum and that of State X do not alone justify the refusal to enforce a valid foreign right. In the words of Justice Cardozo,[31]

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some **fundamental principle of justice, some prevalent conception of good morals,** some **deep-rooted tradition of the common weal.**[32]

This sense of obligation was expressed by a Colorado court in *Harper* v. *People, supra* as follows: "The contract will not be deemed to be opposed to the policy of this state unless based on immoral or criminal considerations."

Is it a violation of a fundamental principle of justice to recognize the title of a conditional vendor when that title is valid by the law of the only jurisdiction in which he has knowingly permitted the property to be present? Is there any immoral or criminal consideration involved in such recognition? If the Colorado courts would relent in the future with respect to conditional sale contracts that were recorded in a sister state, should they not also recognize the title of conditional vendors acquired in other states wherein the law did not require recordation of such interests? Would it be a violation of the deep-rooted tradition of our commonweal to recognize the title of a conditional vendor from State X (where the law does not require recordation) if our courts had determined to recognize the title of a conditional vendor from State Y (where the law requires recordation)? Or is recordation in a foreign state only of dubious value in protecting Colorado citizens?

It is not to be inferred that a state such as Colorado should disregard the welfare of its citizens who deal with non-residents. It is submitted, however, that any attempted distinction between out-of-state chattel mortgages and out-of-state conditional sales

[30] Security Sales Co. v. Blackwell, 9 La. App. 651, 120 So. 250 (1928); Fry Bros. v. Theobold, 205 Ky. 146, 265 S.W.489 (1924); Barrett v. Kelley, 66 Vt. 515, 29 Atl. 809 (1894).

[31] Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

[32] Emphasis added.

contracts, when both are recorded in the other state, relates only to minor morals of expediency and debatable questions of internal policy. It is further submitted that recordation in a distant state, where the transaction is valid by both the *lex loci contractus* and the law of the situs of the property, is of doubtful value in protecting Colorado citizens.

One method by which states have afforded a measure of protection to their citizens is exemplified by section 14 of the Uniform Conditional Sales Act by which the reservation of title in the vendor is void as to certain purchasers and creditors, when the property is removed into another state, unless the vendor, within ten days *after he has received notice of the removal,* records the contract in the state to which the goods have been removed. This principle could be extended so as to apply to chattel mortgages. A second type of protection is found in statutes which give certain classes of lien holders, i.e. repairmen, priority over the title of the conditional vendor. Doubtless there are numerous other measures which a state may adopt for the protection of its citizens, and yet be consistent with a sense of fairness to citizens of other states. But to refuse recognition to rights arising out of certain types of transactions in other states merely because we would prefer the use of other types of transactions is to evidence a provincialism which has no place in our modern commercial life.

Exit Horatio (Laughing)

ANONYMOUS
of the Englewood Bar

In formal format, Dicta's slick
With *supra, ibid., et seq., sic;*
(Boy, those footnotes—fast and thick!)

'Smatter, pal, prefer confetti,
Arthur Godfrey, girls by Petty,
Milton Berle, and etty cetty?

No! Go read Popham, Creamer, Grossman,
Percy Morris and all of those men
Who're not exactly Billy Rose men.

'Twixt hydrogen and between uranium,
You'll need an up-and-coming brainium
(And you, with your ailing, run-down cranium!)

Sit up with Dicta at the midnight forge.
Horatio and I'll be with Gorgeous George.

SUPPLEMENTARY PROCEEDINGS IN ENFORCEMENT OF JUDGMENTS*

WILLIAM RANN NEWCOMB
of the Denver Bar

A layman might suggest as a subtitle for this article, "Back 'em up to the wall" or "How to pick their pockets legally." The source of the legality of such conduct is to be found in Rule 69 of the Colorado Rules of Civil Procedure. It is important at the outset to explain this rule briefly together with its history. The rule is divided into eight parts, subparagraphs "A" through "H". Those parts are as follows:

A. Process to enforce a money judgment shall be a writ of execution, unless the court directs otherwise.

B. Execution for costs may issue in like manner, as upon a judgment.

C. Any person who is a judgment debtor after issuance of an execution against property, may pay the sheriff the amount of the debt and such payment will discharge the judgment.

D. Whenever execution may issue on a judgment, the judgment creditor shall be entitled to an order for the debtor to appear before the court, or a master, at a specified time and place to answer concerning his property. If a debtor resides outside the country, the court may make just orders as to mileage and expenses. If it appears to the court that there is danger of the debtor absconding it may issue an order of arrest, bring him before the court, and require a bond conditioned on his appearing at the time of the hearing and upon disposing of any of his property. If he does not post such a bond, he may be committed to jail.

E. A debtor of the judgment debtor may be required to appear and be questioned.

F. The court, or master, may order any property of the judgment debtor not exempt from execution in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. Violation of this order is punishable by contempt. Nothing in the rule shall be construed to prevent an action in the nature of a creditor's bill.

G. Witnesses may be required to appear and testify as at any trial.

H. Depositions may be taken in the same manner of any person upon order of court obtained ex parte.

The above rule is copied, to a great extent, from the former Code of Civil Procedure. Only two significant changes were made

* This is in substance the discussion given by Mr. Newcomb at the first session of the Denver Bar Association's institute on creditors' rights, January 24, 1950.

in the rule: First, it no longer provides that execution must issue and be returned *nulla bona* as a prerequisite to supplementary proceedings, and, secondly, the motion seeking such an order need not be verified. It should also be noted that in turn the Code is "almost a literal transcript of the provisions of the Code of California on the same subject, and are similar to the provisions of the codes of Wisconsin and New York." [1]

PURPOSE OF RULE 69

There are, it is believed, three fundamental objectives in the use of Rule 69. Behind all of them, however, there lurks the haunting suspicion of counsel that the debtor has some property somewhere that could be applied to the judgment. If the defendant is obviously judgment-proof, it is useless to invoke the rule. If it is suspected he is not judgment-proof, a creditor's lawyer has three things in mind in the use of Rule 69:

(1) Discover his assets.

(2) Have those assets applied on the judgment in a summary fashion at the time of the hearing.

(3) Discover facts concerning the debtor's past and present financial condition and transactions as a basis for additional proceedings, such as a creditor's bill, or involuntary bankruptcy to recover a preference.

In view of these purposes, it is clear that counsel, before embarking upon the use of Rule 69, should have at least a general understanding of the substantive law in the whole field of creditors' rights. If he doesn't, he is not apt to ask the right questions to get at the important facts. For example, if the debtor is a corporation, counsel would want to know if there are any stockholders who have not paid for their stock. He must know the Bulk Sales Act, the laws on fraudulent conveyances, the various acts of bankruptcy, and voidable preferences. It has been said that there are two rules to follow: (1) Always follow-through on questioning to get the complete story. (2) Make sure questions are founded upon the applicable substantive law.

It would be fruitless for anyone to attempt to discuss in detail the exact questions which should be submitted to the debtor or to the debtor's debtor. Suffice it to say that one may find an excellent beginning point in the pamphlet of the Practicing Law Institute, entitled, "Collecting Claims."

METHOD OF INVOKING RULE

Two papers have to be prepared by the lawyer invoking Rule 69 with regard to summoning the judgment debtor—the motion and order. The motion need allege only two things, to-wit: Judgment has been entered and that execution may issue. The order,

[1] Hexter v. Clifford, 5 Colo. 168 (1879).

which must be prepared by counsel in advance, should contain the time and place for the appearance of the debtor. This order may be directed to the clerk to issue a citation, which may then be served by the sheriff on the debtor, or the order could be prepared in duplicate and provide in itself that a copy of the order may be served upon the debtor in the same manner as a summons under Rule 4. It is advisable in preparing the order to leave the time for the hearing blank so that the judge and his clerk may fill it in when it is presented. This proceeding, of course, is ex parte.

ORDERS FOR PROPERTY TO BE APPLIED

In order to discuss this phase of the problem it is necessary to indulge in several assumptions, namely: the judgment debtor has been brought into court and questioned exhaustively as to his property; "his pocket has been picked" of any cash that he might have had on his person and the court has ordered it paid into the registry of the court to be applied on the judgment; and similar orders have been procured with respect to any jewelry or other thing of value he may have had on his person not exempt from execution, such as wearing apparel. It further may be assumed that questioning has developed certain fact situations:

(a) that the debtor has cash in his control.
(b) that the debtor has other intangible personal property.
(c) that the debtor has real estate.
(d) that he has property located outside the state.
(e) that he has money owing him by his debtors.

(a) Cash in Control of Debtor

Where it is learned that the debtor has cash either in a bank account or in some place where he has access to it, is it necessary to adjourn the hearing, deliver a writ of execution to the sheriff, and attempt to race the debtor to the location of the cash? It is not. The authorities are clear that the court may then and there order the debtor to go get the money and either pay it to counsel, to the sheriff, or to the clerk of the court. Conceivably, it may even be possible for the court to order the defendant to make out a check drawn on any bank account which he has admitted he has. Some of the cases dealing with these fascinating possibilities are, as follows:

Hosmer v. Mutual Reserve Ins. Co.[2] In this case the court ordered that the defendant insurance company pay over $250.00 from its surplus to the plaintiff after a full hearing had been had into the financial condition of the company. Incidentally, it was argued in this case that since the company was a mutual fire insurance company, the other members had an equal right to the surplus, but the court said: "Diligence justifies a preference."

[2] 145 Kan. 381, 65 P. 2d 295 (1937).

Medical Finance Ass'n v. Short.[3] Upon examination the defendant disclosed that she had in her possession and under her control a check in her favor in the sum of $47.50 as services rendered to a governmental agency, the Works Progress Administration. The lower court refused to order that she apply any portion of this check to the judgment. The appellate department, however, reversed, and said:

> Although the intangible credit could not be reached by plaintiff in such a proceeding as this while it remained a mere debt due from the government to defendant, it became available and amenable to control of the court when its status and character were changed to the extent of its becoming tangible property in the actual possession and control of defendant, i.e., when she received the check. If necessary or expedient in securing the conversion of the check into legal tender and the application of one-half thereof toward saisfaction of the judgment, the court may appoint a receiver for that purpose.

Wilson v. Columbia Casualty Co.[4] In this case it appeared that shortly after the judgment had been entered, the defendant, who was in Ohio, sent $1250.00 to his brother in Washington, Pennsylvania. It was admitted that the brother held this fund in trust for the defendant. The court, in a supplementary proceeding, found as follows:

> Said Addison R. Wilson (the defendant) owns and has the absolute control and disposition of the sum of $1250.00 which he wrongfully and fraudulently has sent out of the State of Ohio with intent to prevent the same being applied on the judgment in the foregoing action, and should be applied on said judgment, and said application is therefore granted.

The court thereupon ordered the defendant to pay over the said sum to the sheriff to be applied on the judgment. The defendant refused to do so and appealed from his sentence for contempt of court. The Supreme Court of Ohio affirmed the sentence, in the following language:

> Plaintiff in error urges that, since the money sought to be reached was not in the physical possession of Addison R. Wilson, the court was without jurisdiction to make any order respecting the fund. This contention, however, is incorrect. The court of common pleas could not make an order upon the brother in Washington, Pa., to pay the money upon the judgment, nor could it attach or sequester the fund in Washington, Pa., but it could and did order the defendant in Cleveland, Ohio, to take such action that the fund in Pennsylvania could be applied to the satisfaction of the judgment. The jurisdiction of the court over the defendant was undoubted.
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> Obviously the direction from Wilson must be sent from Cleveland to Washington, Pa. When the fund is in the possession of the brother in Pennsylvania, the brother in Ohio cannot physically turn it over in Ohio; but the brother in Ohio can and must set in

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[3] 36 Cal. App. 2d 745, 92 P. 2d 961 (1939).
[4] 118 Ohio St. 319, 160 N.E. 906 (1928).

process the train of action which will result in the same being applied upon this judgment, and that the brother in Ohio, according to this record, has not even begun to do.

(b) Intangible Personal Property of the Debtor

With respect to intangible personal property, the immediately preceding case is important, and in addition, there is the case of *Iowa Methodist Hospital v. Long,*[5] in which it was disclosed upon examination that the defendant had under his control a number of Series "E" Government bonds. It was determined by the lower court that some of them had been purchased directly from the wages of the defendant and were therefore exempt under the statutes of Iowa, which exempt wages, but that some of them had not been so purchased. The court held:

> It is therefore ordered that the defendant sell the balance of the fourteen bonds heretofore not declared exempt to him, and pay the proceeds into the office of the clerk of the municipal court by noon of the 30th day of July, 1943.

On appeal, the Supreme Court held that none of the bonds were exempt and that the order of the lower court should have applied to all of them.

(c) Real Estate of the Debtor

With respect to real estate, the cases are not in accord. In *Walker v. Staley,*[6] the Colorado court said:

> Sec. 270, supra (referring to the Code) does not contemplate that real property may be sold under order of court made in a supplementary proceeding, even when title stands in the name of the judgment debtor. In such case the judgment creditor may cause execution to be levied upon the property; it requires no order of court.

In this case, however, it appeared in the supplementary proceeding that title to the property was in the defendant's wife's name, but more of that later. It should be noted, however, that this case was decided before the Rules of Civil Procedure were adopted. Since, under Rule 69, this proceeding may be instituted without an execution being returned *nulla bona,* the reason for *Walker v. Staley, supra,* no longer seems to apply. Consequently, if the question were argued again it is possible that the Colorado Supreme Court would follow the majority rule as stated below.

Cleverly v. District Court,[7] seems to state the majority view of this question. In this case, on a supplementary proceeding, the lower court found that a piece of real estate standing in the names of the defendants was not exempt as a homestead, directed the sheriff to proceed against the property and to apply the proceeds from the sale thereof towards satisfaction of the judgment. The Supreme Court affirmed, in these words:

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[5] 234 Ia. 843, 12 N.W. 2d 171, 150 A.L.R. 440 (1944).
[6] 89 Colo. 292, 1 P. 2d 924 (1931).
[7] 85 Utah 440, 39 P. 2d 748 (1939).

> Every species of property is included in the term "any property," so that the order may be made applicable to any species of property of a judgment debtor, including real property or an interest therein.

(d) Property of Debtor Outside the State

Where the questioning reveals that the judgment debtor owns real estate or other tangible property in another state there is a serious problem as to how far the Colorado court can go in subjecting that property to the Colorado judgment. There is a scarcity of cases on this point, but what decisions there are seemed to be summed up in 21 *Am. Jur.* 329, as follows:

> A judgment debtor who has property in a foreign state may not be compelled by proceedings supplementary to execution to go there, get the property, and apply it on the judgment. However, it is sometimes regarded as a proper practice to require the judgment debtor to make an assignment of such property to the receiver.

The theory of such cases, of course, is that the order of the court acts *in personam,* and jurisdiction over the property itself is not necessary. In the case of intangible personal property located outside of the state, the cases cited above and particuarly *Wilson v. Columbia Casualty Company, supra,* state the general rule.

(e) Debtor of the Judgment Debtor

The next problem involves the situation where inquiry of the judgment debtor reveals that property belonging to him is in the name or hands of another person, or that someone owes him money. It is clear that counsel cannot then and there procure an order directed to the third party, since he is not as yet a party to the proceeding. *Walker v. Staley, supra.* In this case, the lower court, upon the questioning of the defendant alone, found that title to a piece of real estate in the name of his wife really belonged to defendant. The court appointed a receiver of the property and directed him to take charge of it and sell it, pay the receiver's expenses, the court costs and the judgment. Mrs. Walker was never a party to the proceeding. The Colorado Supreme Court reversed, in these words:

> It was beyond the jurisdiction of the court to make such an order. The court had no power to order the receiver to take possession of the property and sell it without first according to Mrs. Walker her day in court. That she never had.

The court also said that the proper remedy was a creditor's suit.

Bond v. Bulgheroni,[8] held that a creditor's bill was the proper remedy where there were adverse claimants to the property involved. *Brindjonc v. Brindjonc,*[9] took a somewhat different approach. In this case the proceedings developed that a third party

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[8] 215 Cal. 7, 8 P. 130 (1932).
[9] 96 Mont. 489, 31 P. 2d 725 (1934).

held funds which the defendant claimed belonged to the defendant. The court stated that no order could be made requiring the third party to pay over the money to the plaintiff at that time. The proper procedure was to continue the hearing and order the third party in to determine whether he had any claim to the property and, if he disclaimed any interest, the appropriate order could be made.

PENALTIES FOR DISOBEYING ORDERS UNDER RULE 69

Under Rule 69(f) the court, or master, has ample authority to punish any party or witness for contempt for disobeying any proper order. It has also been held in Colorado in the case of *Handler v. Gordon,*[10] that where the judgment debtor in the supplementary proceeding committed perjury, and it was so established in the hearing itself, the court has the right summarily to punish him for contempt without leaving the punishment to formal criminal processes. The theory, of course, is that perjury causes an obstruction of justice.

The case of the lying judgment debtor, however, presents many very serious problems. Assuming that the debtor is prepared to perjure himself concerning his assets, he has the questioner at a psychological disadvantage from the beginning because he is generally smart enough to know that the examiner doesn't know all that he knows, or he would not have been summoned into court to answer questions. Consequently, there is some slight incentive to lie about the matters inquired into. Here the examiner must resort to all the techniques generally known to the trial lawyer as to how to treat the perjuring witness. There is no one satisfactory answer to it. The author's experience in such a case has been to wish fervently that our humane laws had not abolished the debtor's prison.

MISCELLANEOUS POINTS TO BE CONSIDERED UNDER THE RULE

(a) Interim period between service of the order on the debtor to appear and the hearing. Isn't there the danger that the judgment debtor will cover up his property during that period of time? In other words, is one entitled to a restraining order? There is no mention made of this in the rule, and the only Colorado case is *Rule v. Gumeer.*[11] In this case, the lower court included in its order requiring the defendant to appear an order restraining him from transferring any of his property, real or personal. The defendant moved to vacate the restraining order, his motion was overruled, and he appealed. The supreme court denied the appeal without considering the merits on the ground that the order was not appealable. The moral seems to be: get the order ex parte to be safe. The

[10] 111 Colo. 234, 140 P. 2d 622 (1943).
[11] 12 Colo. 591 (1889).

author has been able to find no cases from other jurisdictions; it should be pointed out, however, that the New York Code specifically provides for it.

(b) Interim period between time of hearing and levy, or other action contemplated, such as a creditor's bill. It is clear that a court has inherent authority to issue such a restraining order, in view of the authority given to the court in the first place by Rule 69(f) to require the debtor to apply his property to satisfaction of the judgment.

(c) Documents may be required to be produced. Rule 69(g) provides for the subpoena of witnesses as upon the trial of any civil action. It would seem possible, therefore, to cause a subpoena duces tecum, under Rule 45(b), to be directed to the defendant along with the order requiring him to appear, and get the necessary business records, etc. An interesting question in this case would be the right to compel the production of retained copies of income tax returns. *Leonard v. Wargon,*[12] held that a judgment debtor may be questioned concerning recent Federal income tax returns filed by him, and he may be required by order of the court to produce copies of such returns in the debtor's possession. The court points out, of course, that the judgment creditor may not compel the production of the originals of any federal agency or employee. There is a conflict on this point, however, with regard to discovery rules in the trial of a civil action.

(d) Does the discovery of assets through Rule 69 give a judgment creditor a priority? There is a distinct possibility of this. The question is annotated for your further consideration in 92 A. L. R. 1430, which states:

> Although the question is largely one of statutory interpretation, the prevailing view is that a judgment creditor who institutes supplementary proceedings, at some stage of the proceedings, acquires a lien upon the property disclosed thereby.

This may be of great importance where there are other judgment creditors after the same assets. One of the cases cited by 92 A. L. R. is *Ex parte Roddey.*[13] There were three judgment creditors involved here. One of them instituted supplementary proceedings which disclosed that the debtor had certain securities of the value of about $1000 which had been hypothecated in New York to secure an indebtedness of about $185. The lower court issued an order directing the sheriff to levy upon this property. Pursuant to this order, the holder of the securities forwarded them to a bank in South Carolina. In the meantime, all three judgment creditors had placed their writs of execution in the hands of the sheriff. He took the three executions, levied on the securities, and sold them. Then the dispute arose as to whether all three of the judgment creditors should share pro rata in the balance of the sales price

[12] 55 N. Y. Supp. 2d 626 (1945).
[13] 171 So. Car. 489, 172 S.E. 866 (1934).

after the payment of the debt for which they were pledged. The Supreme Court of South Carolina granted a priority to the judgment creditor who had instituted the supplementary proceeding, and said:

> It is patent that supplementary proceedings are equitable in their nature and designed to aid the enforcement of rights which cannot be enforced by the legal process of execution. That being so, it much follow that Judge Stoll (the lower court) had authority to direct the payment of the proceeds of the sale of the debtor's property to the judgment creditor whose diligence had discovered the property of the judgment debtor and brought it into court.

In Hexter v. Clifford,[14] it was recognized that supplementary proceedings are analogous to creditors' bills. However, the case holds that supplementary proceedings under the Code became an exclusive remedy and that a creditors' bill could not be maintained in any case where supplementary proceedings would lie. The theory back of that case has certainly been changed by Rule 69, which says: "Nothing in this Rule shall be construed to prevent an action in the nature of a creditor's bill." Consequently, the matter is still very much an open question in this state but is certainly an arguable possibility.

RECOMMENDED AMENDMENTS TO RULE 69

There are two glaring deficiencies in Rule 69 which the author would recommend be changed in accordance with New York procedure: First, there is the problem which is mentioned briefly above concerning the interim period between the time of service of the order to appear and the time of the hearing itself. In New York there is a specific provision which allows the court on an ex parte application to include in its order to appear a blanket restraining order enjoining the debtor (or the debtor of the judgment debtor, as the case may be) from making any transfer, assignment or other disposition of his property. This restraining order may be continued from time to time during the pendency of the hearing.

Secondly, there is the problem of the wage earner debtor in this state. Our present practice is to run a garnishment on his wages. This is not only likely to disappoint the creditor so far as results are concerned, but also, in many cases, results in a loss of job or subterfuges where it appears that the garnishment is going to become a weekly or monthly problem. Such a result benefits no one. The New York Code, however, provides that in such a case the court, after a full hearing, may order the debtor to pay over to the creditor, or into court, a certain sum of money out of each pay check. The amount to be paid is fixed by the Code as to that amount over and above the necessary living expenses of the debtor and his family. This is certainly a much more sensible approach to the problem and one that could well be considered in this state.

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[14] 5 Colo. 168 (1879).

REACHING FRAUDULENT CONVEYANCES AND EQUITABLE INTERESTS OF DEBTORS*

WORTH ALLEN
of the Denver Bar

The equitable rights and remedies of creditors which will be dealt with in this paper relate to two different types of property interests of the debtor: (1) property which has been fraudulently [1] conveyed by debtors, and (2) equitable interests which debtors may have in property.

The existence of a creditor's interest in the first class is established by a section of the Colorado statutes [2] which provides that every conveyance of real estate, goods, things in action, rents, profits, etc., made with intent to hinder, delay or defraud creditors or other persons, as against the person hindered, delayed or defrauded, "shall be void". The conveyances referred to in the statute are, obviously, those made by debtors. It should be noted that the statute in terms applies to personal property as well as real estate.[3] However, while much that is said in the cases applies with equal force to conveyances of real and personal property, this brief article will be confined to real estate. It may be pointed out in passing that while there is no difference in principle between cases involving personal and real property, the duration of a statutory lien on personal property is much shorter than that on real property, and the statute relating to *lis pendens* does not apply to personal property.

In the second class of cases in which creditors seek to realize their claims out of equitable interests of the debtors, the statute relating to fraudulent conveyances is not involved. To illustrate the nature of the equitable interests involved in this class of cases, we may suppose that a debtor buys property, furnishing the consideration himself, and to conceal the property from his creditors, he directs the grantor to convey to the debtor's wife or some other person. Another type of case which comes under this second class arises when the property is conveyed by the debtor himself to the third party at a time when he was not involved financially and when he could not have had any fraudulent intent. At any rate, in such a case, the valid legal title is in a third person, and the debtor

* This is an adaptation of the second paper presented at the Denver Bar Association's Institute on creditors' rights, January 24, 1950.

[1] The words, fraud, fraudulent, fraudulently, are used herein to refer to cases including those where possibly no actual fraud was intended, but where the intent, however well-meant, was to hinder and delay.

[2] COLO. STAT. ANN., c. 71, § 17 (1935).

[3] This is a modification of the English statute against fraudulent conveyances, 13 Eliz. c. 5, which, by the decision of Sir Edward Coke in Twyne's Case, 3 Coke, 80 b, 5 Eng. Rul. Cas. 2, was judicially determined to include conveyances of personal property.

has only the equitable title. Such title may be based on the intent of the parties, or the trust may be a constructive one imposed by law.

NECESSARY PRELIMINARY STEPS

What steps are or have been necessary to reach the two classes of property? Without an understanding of the sound *ratio decidendi,* lawyers are left in hopeless confusion after reading the cases in which the courts themselves obviously have been confused. Despite this apparent confusion in these recent cases, the results seem to be proper.

The rule in both classes of cases has been that the general creditor must have a judgment against the debtor before he can secure relief against the latter in equity. While the reason for the rule consistently has been stated to be "that resort cannot be had to equity where there is an adequate remedy at law", underlying the rule and stated reason therefor is the zealously guarded right of trial by jury. It has been correctly stated that "the real basis of the rule that a judgment at law is a condition precedent to affirmative equitable relief on behalf of a creditor is, therefore, that the debtor has the right to have the issue of indebtedness determined by jury." [4]

The rule requiring judgment before granting negative relief, which is the tying-up of the debtor's property before judgment has been obtained against him, is based upon consideration for the debtor. The courts concluded that it was better to leave the debtor free to deal with his property, although he may put it out of reach of his creditors before they obtain a judgment against him, than possibly to permit some unscrupulous creditor to keep the struggling debtor from honestly attempting to meet his obligations.

The great confusion has arisen in considering what further steps, if any, must be taken in the two classes of cases before resorting to equity. Under the original English statute against fraudulent conveyances and similar statutes of the states, property fraudulently conveyed by the debtor is subject to execution. Property to which the debtor had only equitable title was not at common law or under early statutes subject to execution. The theory under which relief is granted against property subject to execution is entirely different from the theory under which aid is extended to reach property not subject to execution. It is obvious from the decisions that the confusion of ideas is caused primarily by overlooking the basis on which jurisdiction rests, and by the presumption that the necessary steps, which are conditions precedent to relief in all instances where the creditor is attempting to obtain property not subject to execution, are also necessary where he is pursuing property which *is* subject to execution.

[4] See Note, 23 L.R.A. (N.S.) 11.

WHERE THE PROPERTY IS SUBJECT TO EXECUTION

As to property subject to execution, the judgment creditor was required to take steps to secure a lien upon the property fraudulently conveyed. The lien attaches to real estate in Colorado upon the filing with the recorder of a certified transcript of the judgment docket entry.[5] Thereupon the judgment creditor went into equity and stated that the transfer was fraudulent and that his lien was clouded and obstructed by the fraudulent transfer. He alleged that his lien was to no avail under the present circumstances and asked that the court clear-up the title, so as to enable him to enforce the holding of the court of law and allow him to make an advantageous sale of the property in question.

The lien was all that was required. The rule as to exhaustion of the remedy at law had no application here. As a matter of fact, one could not properly have made a return *nulla bona,* for the obvious reason that the property fraudulently conveyed could be levied upon and sold, the fraudulent conveyance being void. But, even when this property is levied upon and sold, we are still unable to make an advantageous sale because no determination by a decree as to whether the conveyance was fraudulent had been made. Relief át law being inadequate in such a situation, equity took jurisdiction.

WHERE EQUITABLE TITLE IS IN THE DEBTOR

When relief was sought in the second class of cases, wherein the judgment creditor sought to reach equitable title, no levy of execution could be made until authorized by comparatively recent statutes. The creditor had no lien which he could ask equity to clear. In this class of cases, as distinguished from the class involving property fraudulently conveyed by the debtor, the creditor was required to exhaust his remedy at law by showing that the debtor had no other property which might be reached by ordinary legal remedies.[6] Thus, in cases of this type, we have the requirement of a return *nulla bona,* such a return being merely proof that there was no other property out of which the creditor's judgment could be collected.

This fundamental distinction between the two classes of cases, and the different conditions precedent for equitable relief in each class, is set forth in the opinion of our Supreme Court in the case of *Chalupa* v. *Preston,*[7] wherein the court quoted at length from the very clear and sound opinion written by Judge Sanborn in *Schofield v. Ute Coal & Coke Co.,*[8] a case appealed from the United States Circuit Court for the District of Colorado.

In our Colorado statutes we find the provision that from the time of filing the transcript, the judgment becomes a lien upon "all

[5] COLO. STAT. ANN., c. 93, § 2 (1935).
[6] Emery v. Yount, 7 Colo. 107, 1 P. 686 (1883).
[7] 65 Colo. 400, 177 P. 965 (1918).
[8] 92 F. 269 (1899).

the real property of such judgment debtor—".[9] Nothing is said as to whether the interest to which the lien attaches may be an equitable one, although a subsequent section of this same chapter provides for levy upon every interest in land, legal and equitable.[10] It has been held by our Supreme Court,[11] that a judgment, upon the filing of the transcript, becomes a lien upon an equitable interest in land. It would seem, therefore, that from the time the two statutory provisions just referred to became effective, the second class of cases involving the reaching of equitable interests in land became subject to the same rules as the first class of cases in which the legal title remained in the judgment debtor in spite of his fraudulent conveyance. As a result of this, the supreme court held that no return *nulla bona* is required as a condition precedent to reaching the equitable interests of the judgment debtor in real estate, after the judgment creditor has secured a lien by filing the transcript. In holding this to be the law, our Colorado courts have stated that the levy of an execution upon a lien could not make it more specific or more efficient. The learned justices seemed to feel that the conclusion is irresistible that the general lien upon the real estate created by entering a judgment or filing a transcript of it in the county where the lands of the debtor are situated, in accordance with the statutes which provide therefor, is a sufficient basis for the maintenance of a suit in equity to remove a fraudulent obstruction to the enforcement of that lien.[12]

Space will not permit the consideration of many other questions involved in a creditor's suit or in a suit in the nature of creditor's suit.[13] They cause no particular difficulty. I might point out that in exceptional cases it has been held unnecessary to procure a judgment against the debtor before seeking equitable relief. For instance, it was held that when the judgment debtor is a non-resident, a money judgment is not essential and that a lien might be obtained by a creditor's suit with a notice of *lis pendens*.[14]

In passing, it may be pointed out that even though a debtor conveys property to a creditor with intent to defraud or to hinder and delay one or more other creditors, the conveyance is good if the grantee did not participate in the known intent of the grantor, but took the conveyance solely to secure payment of his own claim. Knowledge on the part of the creditor receiving the property that the debtor has acted with fraudulent intention is immaterial if the creditor has not done anything except receive payment of his claim. It is obvious that a creditor of an insolvent debtor must stop at securing his debt. If he goes further than this and actively participates or assists in any way in the carrying out of the fraudulent

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[9] COLO. STAT. ANN., c. 93, § 2 (1935).
[10] *Id.*, § 6.
[11] Stephens v. Parvin, 33 Colo. 60, 78 P. 688 (1904).
[12] Stephens v. Parvin, 33 Colo. 60, 78 Pac. 688 (1904).
[13] We need not dwell on the fact that a creditor's suit is one in which equitable title is sought to be reached, and that a suit for relief with respect to property fraudulently conveyed is one in the nature of a creditor's suit.
[14] Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041 (1924).

purpose, his preference so obtained will be avoided in favor of other creditors. The motives which may have influenced the debtor to prefer one creditor over the others are of no importance if the preferred creditor has done nothing improper to secure the transfer.

THE EFFECT OF RULE 18 (b)

The consideration shown by the courts for those alleged to be debtors, by leaving their property free from any lien or cloud until a money judgment had been obtained, was abandoned by the adoption of Rule 18 (b) of our Rules of Civil Procedure, which provides:

> (b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

The result is that now the creditor may bring suit to recover a judgment and, in the same action, secure a decree declaring a conveyance void as being fraudulent. By filing a notice of *lis pendens*, the debtor's property is held for an appropriate equitable decree with respect thereto, if a money judgment is obtained and the conveyance is held to be fraudulent.

No case has been found under said rule, or under the identical Federal Rule 18 (b), in which a creditor has sought a money judgment and a decree respecting the debtor's *equitable* title in real estate. However, the first sentence of the rule obviously is broad enough to include such a case. The second sentence of the rule in referring to a fraudulent conveyance "in particular" must be regarded as providing an illustration or as saying that the general rule found in the first sentence includes the case set forth in the second.[15]

In a Federal case,[16] the *modus operandi* in the trial of a case brought under said rule was stated as follows:

> . . . I rule that all issues which are common to the legal causes of action (in either count) and to the equitable cause stated in the second count shall be tried together, the legal issues, of course, to the jury and the equitable issues to the court; and that all equitable issues which do not pertain to the legal causes shall be tried to the court immediately following the jury trial.
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> This ruling will have practical application as follows: On the day of trial . . . the parties will proceed precisely as though trying to the jury both the first count and the second count viewed as charging actionable fraud, and the rulings on the evidence will be made as though no other issues were before the court. The court, however, will accept all evidence which is received in the jury trial for any proper bearing it may have upon the second count viewed

[15] Greeley Transportation Co. v. The People, 79 Colo. 307, 245 P. 720 (1926).
[16] Ford v. C. E. Wilson Co., Inc., 30 F. Supp. 163, 165-66 (1939).

> as a cause of action in equity. After the jury has been charged and has retired to deliberate, the court will proceed to hear additional evidence on the equitable cause stated in the second count. There will be neither need nor permission to reiterate evidence already received in the jury trial; but any evidence theretofore offered and excluded in the jury trial may again be offered for its bearing on the second count viewed as a cause of action in equity.

Thus it is apparent that many of the old problems arising from questions pertaining to equitable rights and the remedies of creditors have been greatly simplified by the adoption of Rule 18 (b).

Book Notices

LABOR RELATIONS LAW, *by Marcus Manoff of the Massachusetts and Pennsylvania Bars.* 1950. $2.00. 140 pages.

A series of basic texts on important subjects of the law is being published by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association. This pamphlet is another in that series.

There has long been a need to the average general practitioner, not particularly skilled in the subject, for a basic text on the subject of labor relations law. Most general practitioners who represent business clients have need for at least some knowledge of this important subject. With such knowledge, they can solve many of the problems confronting them without the necessity of turning them over to a specialist. Also, with such a basic knowledge they can gradually undertake the responsibility of the more complicated labor problems of their clients. This book fills that need. It covers the substantive aspects of labor law and combines with this insights into practical problems. It is a general orientation booklet and a guide to substantive and procedural matters constantly confronting the business client.

PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT, *by Cyrus Austin of the New York Bar.* 1950. $2.00. 163 pages.

The Robinson-Patman Act is of prime importance to every businessman whose business crosses state lines. Therefore, every lawyer representing such clients should know something about the act. Unfortunately, few do. This is no mere handbook. It is a concise but comprehensive treatise, covering in one compact volume all of the subsections of the act. Each is analyzed in turn and all important questions of construction and compliance which have arisen and which are apt to arise are treated. The Robinson-Patman Act is not of importance alone to lawyers who must advise clients engaged in selling goods as to how to conform their pricing practices to the act's requirements. This book will be found valuable for reference in determining the rights and responsibilities of buyers as well.

EXECUTIONS AND LEVIES ON TANGIBLE PROPERTY*

GRAHAM SUSMAN
of the Denver Bar

The subject of "Judgment and Executions" covers nearly an entire volume in *Corpus Juris,* so that it is apparent that only the highlights of the Colorado law on this subject can be covered in an article of this length. The statutory law may be found in Chapter 93 of the Colorado Statutes Annotated (1935), and reference hereinafter made to specific sections are intended to refer to that chapter.

Section 2 provides that a transcript of judgment may be recorded in any county, and *from the time of filing* becomes a lien on the real property of such judgment debtor located in that county, not exempt from execution, then owned or which may thereafter be acquired, until the lien expires. The general lien created by the recording of the transcript is good for a period of six years *from the entry of the judgment* as distinguished from the date of recording. A transcript may be issued and recorded immediately after the judgment is entered, even before the filing of a motion for new trial. There is no necessity to wait for ten days, as in the case of an execution, and for that reason it is advisable to obtain the transcript and to record it as quickly as possible after the judgment is entered. There is no limit as to the number of transcripts that may be issued on the same judgment.

An execution may be issued on a judgment of record at any time within twenty years (within six years in the justice court), and not afterwards, unless the judgment is revived as provided by law. Section 11 provides that the execution may be issued to any county, so that it is possible to obtain an execution for each county in the state at the same time, but only one execution will be issued for any one county at any one time. If it is necessary to obtain another execution to the same county, the previous outstanding execution must be returned, together with the sheriff's return thereon.

Section 12 provides that when an execution has been issued, it shall be delivered to the sheriff, who must then endorse thereon the exact date, year and hour that it is received. This information is also entered in a book which he maintains for that purpose, and this record is open to the public. The effect of this entry by the sheriff is to make the execution a lien upon the personal property of the debtor from the date of such entry.[1] The sheriff must then make his return on the execution within 90 days "unless a sale is pending under a levy made."

* This article highlights the third part of the Denver Bar Association's institute on creditors' rights and was presented by Mr. Susman at the meeting on January 31, 1950.

[1] Joslin v. Spangler, 13 Colo. 491, 22 P. 804 (1889).

LEVIES ON REAL ESTATE

Section 40 provides that when an execution is issued from any district or county court, and a levy is made upon real estate, it is the duty of the sheriff to file a certificate of such fact with the recorder of the county where such real estate is situated. From and after filing the same, such levy takes effect as to creditors and *bona fide* purchasers without notice, and not before. The lien created by the recording of the levy is a specific lien upon the property therein described for a period of six years from the date of filing of the certificate. The attorney should make certain that the correct legal description of the property is contained in the certificate. It might be well here to point out that the general lien of the transcript is good for six years from the date of the judgment, but the specific lien of the levy is good for six years from the date of the filing of the certificate. This distinction should be kept in mind.

In order to proceed with the sheriff's sale, it is necessary that the sheriff then serve a "Notice of Levy" upon the judgment debtor, as required by Section 31. This notice must be served in the same manner as service of summons. If the debtor is not available for service, then the notice must be published in the county for ten days, and the clerk must mail a copy of the notice of levy to his last known address, postage prepaid, and make and file an affidavit of such mailing.

Within ten days after the service of the notice of levy, the defendant may file his written claim for exemption with the clerk of the court setting forth a description of the property levied upon and the grounds of such claim of exemption.[2] If the defendant fails to file his written claim for exemption within the ten days after date of service, he waives his claim for exemption, and thereafter he has no claim for damages against the officer making the levy or against the plaintiff for levying on such exempt property. This applies to personal property as well as real estate. On the other hand, if the defendant files a written claim of exemption within the ten days, then all further proceedings in connection with the levy, sale, etc., are stayed until the matter of the claim of exemption can be heard.

The court must immediately set the claim of exemption for hearing at a time not less than five nor more than fifteen days from the date of filing. If the district judge is not available to hear the claim of exemption, or if he is disqualified or otherwise unable to act, the county judge shall hear and determine the claim, and his findings shall have the same force and effect as those of a district court judge. If the court finds the property to be exempt, it will enter an order to release the property, otherwise it will enter an order that the property be sold. The order on the question of whether or not the property is exempt, having been entered by the

[2] For general exemption, *see* COLO. STAT. ANN., c. 93, §§ 13 to 22 (1935). For homestead exemptions, *see* COLO. STAT. ANN., c. 93, § 23 to 29 (1935).

court, it is a *final* judgment for the purpose of appeal or writ of error.

Assuming the property is held to be not exempt, the sheriff must then advertise the sale for at least twenty days in some daily or weekly newspaper in the county. If there is no newspaper in the county, then notice is given by a posting in "three of the most public places" in the county. The notice must contain a description of the property to be sold and a designation of the time and place of sale. The sale must be a public rather than a private sale, and it is usually held at the front entrance of the court house. It must be held between the hours of 9:00 o'clock in the morning "and the setting of the sun, the same day." There seems to be no statutory requirement providing for notice of sale to be given to the defendant other than the advertising for the twenty day period. However, many attorneys usually send a copy of the advertisement to the defendant by registered mail.

If the sheriff sells the property without advertising it, or otherwise giving notice as required by statute, "the sheriff or other officer so offending shall, for every offense, forfeit and pay the sum of $50.00, to be recovered, with costs of suit, in any court of record in this state by the person whose lands may be advertised and sold." [3]

As soon as the sale is completed, the sheriff then issues a certificate of purchase which contains a description of the property, the price bid, and the time within which the purchaser is entitled to a deed. He must also record a duplicate copy of such certificate with the recorder within ten days from the date of sale.

THE REDEMPTION FROM SALE OF THE PROPERTY

From this point, the procedure concerning redemption by the defendant or subsequent lienors is practically the same as redemption from sale under a trust deed by the public trustee. Upon the expiration of the period of redemption, if the property has not been redeemed, the sheriff must execute and deliver a deed to the then holder of the certificate of purchase. Such deed vests a title free and clear of all liens *recorded subsequent to the recording of the lien on which the sale was based.* This deed should then be recorded.

Questions have sometimes arisen regarding the payment of taxes, interest on prior encumbrances, water, insurance, etc. during the period of redemption. By Section 53 the holder of the certificate of purchase may pay any general or special taxes, water assessments, premiums on insurance covering the property, or interest or principal due on a prior encumbrance, and upon presentation to the sheriff of receipts for such payments, they become an additional claim in favor of the holder of the certificate of purchase. Before the redemption can be made, the debtor must pay

[3] *See* COLO. STAT. ANN., c. 93, § 47 (1935).

these additional amounts, together with lawful interest, in order to obtain a certificate of redemption.

Quite often an attorney will cause a levy to be made, have the defendant served with a notice of levy, and thereafter hold up the actual sale for one reason or another, usually to give the defendant an opportunity to make payment of the judgment. In the meantime, the creditor has a specific lien on the real estate, which is good for six years from the date of levy, and he is not particularly worried about the defendant disposing of the property. If he permits the ninety days under the execution to lapse before deciding to proceed with the sale, he cannot do so under the execution on which the levy was based because such execution has expired. It would serve no useful purpose to obtain a new execution because the levy was made under a previous one. The proper procedure, under such circumstances, is for the creditor to file a petition in court setting forth the facts of the execution, the levy, a description of the property levied upon, and the fact that the execution upon which the levy was made has now expired, and request the court for an order to sell. The court will then issue an order directed to the sheriff to proceed with the sale, and it then continues in the same manner as though the execution had not expired. This is the same procedure as the old common law writ of *venditioni exponas.*[4]

LEVIES ON PERSONAL PROPERTY

Much of the material contained in the foregoing discussion relative to the sale of real estate is equally applicable to the sale of personal property. It has already been pointed out that the entry of the execution in the sheriff's book constitutes a lien on the personal property of the debtor, although there cannot be a sale of such property until there has been an actual seizure and it is in the possession of the sheriff. The procedure for service of notice of levy is exactly the same whether it be real or personal property.

The sale of personal property must be advertised by the sheriff for a period of ten days, instead of twenty days as in the case of real estate, and the public sale then proceeds in the same manner. The only difference is the fact that there is no redemption period when personal property is sold. The buyer obtains a sheriff's bill of sale, and upon payment of the bid, the personal property is delivered to the buyer.

Generally speaking, any specie of personal property described as a chattel is subject to execution, provided that it is not exempt by statute, and provided that it is in being at the time of the levy and sale.[5] Under Section 8, the sheriff may levy upon "all current gold and silver coins, bank bills and other evidences of debt, used

[4] 66 C. J. 430.
[5] 23 C. J. 325.

or circulated . . . as money." Under this statute, the sheriff may levy upon the money in a cash register or strong box.

In the event that the value of the property seized is greater than the statutory exemption, the court may order the property sold, and out of the first proceeds of such sale, order that the defendant shall be paid the amount of his exemption. For example, tools in trade are exempt up to $200. If a creditor should attach a printing machine and sell it for $500, he must pay the first $200 to the defendant and apply the balance to the reduction of the judgment. On the other hand, if the property seized consists of a number of items and can be divided, the value of each item may be fixed by an appraiser appointed by the court, and the defendant may then choose such items as he pleases, not to exceed the amount of his exemption. The balance may then be sold to apply on the judgment.

REVIVAL OF JUDGMENTS

It has heretofore been pointed out that a transcript is only good as a general lien for a period of six years from the date of judgment, although an execution may be issued at any time within twenty years from the date of judgment in a court of record. This raises the practical problem of how to keep a transcript alive after the judgment is six years old. This can be accomplished by means of reviving the judgment.

Rule 54 C (h) sets forth the manner in which a judgment may be revived. A motion should be filed setting forth the date of the judgment and the amount remaining unsatisfied. The clerk then issues a notice directed to the defendant to show cause within ten days why the judgment should not be revived. This notice must be served upon the defendant in the same manner as a summons.

If the defendant answers, a trial may be held on the issue presented by the answer. If no answer is filed, a revived judgment is entered after the expiration of the ten day period. A new transcript should then be obtained and recorded.

The rules provide that if a judgment is revived before the expiration of a lien created by the original judgment, the filing of a transcript of "entry of revivor" with the clerk and recorded before the expiration of the lien continues that lien for the same period from the entry of the revived judgment as is provided for original judgments. A revived judgment may be again revived in a court of record but not in the justice court.

The important thing to keep in mind in connection with this subject is that the revived judgment must be entered *within* twenty years after the entry of judgment which it revives, six years in the justice court.[6] In other words, one cannot wait until five days before the expiration of the twenty year period, because a ten day

[6] COLO. STAT. ANN., c. 96 § 44 (1) and 44(2) (Supp. 1949).

notice is necessary, and time for service must be allowed. In such event the judgment of revival could not possibly be entered before the original judgment expired. Sufficient time must, therefore, be allowed for this purpose.

STATUS OF JUDGMENT CREDITOR IN COLORADO

One of the important phases of this subject and one upon which there is a decided difference of opinion, is the question of the status of the judgment creditor in Colorado. As will be presently indicated, even the decisions of the Colorado Supreme Court on this subject cannot be reconciled. In the case of *Zuckerman v. Gunther,*[7] our court made the unqualified statement that, "The law in this state is to the effect that a judgment creditor is in the same position as a *bona fide* purchaser for value."

It appears that Zuckerman had two cars that he desired to sell. He took them to a used car lot in Denver on Broadway where there was displayed a sign reading, "Consignment Lot". He left the cars there to be sold. The sheriff then seized the cars under an execution which he held against the owner of the car lot, and Zuckerman brought replevin against the sheriff. There had been no transfer of titles to the used car dealer. The court held that the execution creditor was entitled to the cars, and Zuckerman, although an innocent party to the transaction, lost his cars. The opinion further states that the court was "not impressed with the attempted distinction that the seizure of the cars was not in the usual course of trade in view of the legal status of the defendant as a *bona fide* purchaser for value. *Under our law, one connotes the other.* The record presents purely a question of estoppel."

It might be conceded that if a *bona fide* purchaser for value bought the cars in the usual course of trade, such purchaser would have a good title, but here, because of the theory of estoppel and the legal status of an execution creditor as a *bona fide* purchaser, the judgment creditor obtain a better title than the debtor himself, who had no title at all.

The Supreme Court has never overruled the *Zuckerman* case but it has refused to follow it in subsequent decisions. In *Wilson v. Mosko,*[8] both plaintiff and defendant were used car dealers. Wilson delivered a car to one Kelly, also a dealer, for the purpose of demonstration and sale. Kelly sold the car to Mosko and obtained payment therefor. Later, on a pretext, Kelly obtained possession of the car and returned it to Wilson's garage. Mosko learned that the car was there, retook possession, whereupon Wilson brought a replevin action against Mosko.

Here was a situation in which Wilson had placed the car in the possession of a dealer for purpose of resale, just as Zuckerman did

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[7] 105 Colo. 176, 96 P. 2d 4 (1939).
[8] 110 Colo. 127, 130 P. 2d 927 (1942).

in leaving his cars at the consignment lot. If an attaching creditor of Kelly had seized the car while in Kelly's possession under an execution, then, presumably, the factual situation would be the same as in the *Zuckerman* case, and the execution creditor would have obtained a good title as against the real owner. Mosko was more than an execution creditor, he was a *bona fide* purchaser for value. But the court refused to follow the *Zuckerman* case and held in favor of Wilson. The court distinguished that case by saying that here there was no showing of an actual authority in Kelly to sell and transfer title to the car. The extent of his authority was to find a purchaser.

This case was immediately followed by *Gunthner v. Union Finance Co.*[9] There the loan company had a floor-plan chattel mortgage on a car owned by the used car dealer. Such a mortgage provides that the car is not to be sold for less than the amount of the encumbrance and that, upon sale, the proceeds are to be delivered to the finance company. A judgment creditor of the used car dealer seized the car under execution. The creditor claimed that it took the car free from the lien of the chattel mortgage.

The car was a part of the stock in trade, having been on the used car lot when taken. If a clear title could have been acquired by a *bona fide* purchaser for value, under the authority of the *Zuckerman* case the attaching creditor would also take it free from the chattel mortgage. The creditor relied entirely upon the *Zuckerman* case, but again the court refused to follow its previous decision. The only basis for distinction is pointed out by the court in this statement: "We think the *Zuckerman* case has no application as is indicated by one statement therefrom, viz: the record presents purely a question of estoppel."

In the opinion of the writer, this purported distinction has no basis in fact. The legal question involved in the two cases are identical, and the court could have clarified the law if it had come out openly and said that it had probably made a mistake in the *Zuckerman* case and that it was expressly overruled.

THE LATEST COLORADO CASE RETURNS TO THE GENERAL RULE

Many lawyers who handle this type of litigation were curious to know what the court would decide in a case involving a judgment creditor and where the element of estoppel was also present. Such a case was recently decided in *Susman v. Exchange National Bank.*[10] In that case the plaintiff had a judgment against one Taylor for about $2,000. Learning that he had a checking account in a certain bank, plaintiff obtained execution and garnisheed the bank. The bank answered that it had $728 on deposit in a checking account in the name of the defendant. Thereupon a third party

[9] 110 Colo. 449, 135 P. 2d 237 (1943).
[10] 117 Colo. 12, 183 P. 2d 571 (1947).

filed a petition in intervention, claiming that the money belonged to him.

The intervenor alleged that he had given Taylor $750 for the purpose of buying some cows; that Taylor had deposited his money to his account in his own name; and that before he had a chance to buy the cows, the garnishment impounded the funds. At the trial, it was established that there had been a deposit of $750 about the time of the transaction with the intervenor, but it also appeared that Taylor had paid amounts to a grocery store, a department store, and a music teacher by check drawn on this account and had thus actually used some of the $750 for these purposes.

It thus appeared that the intervenor had given the judgment debtor ostensible ownership of the fund, and the element of estoppel was present and was pleaded. If Taylor had bought his wife a new dress and paid for it by check drawn on this account, could it be successively urged that the intervenor could follow the fund and reclaim it from the merchant? The judgment debtor had full control of the account, and there was nothing to indicate that there had been a special deposit or that the money constituted a trust fund. Keeping in mind the status of a judgment creditor under the *Zuckerman* case, the plaintiff was in the same position as a bona fide purchaser for value. He was in the same position as the grocer and the department store who had accepted Taylor's checks in return for merchandise.

The court held for the intervenor saying:

> The garnishing creditor can reach funds of the depositor only in cases where the depositor is the true owner thereof . . . The creditor of a bank depositor who garnishes the money in the bank to the credit of his debtor is in no better position than the depositor. Consequently, funds cannot be attached or garnished in an action against the depositor where they have been deposited in trust or belonging to another. We regard Zuckerman v. Guther as distinguishable.

Under this latest decision, it would appear that the court has completely reversed itself, and instead of holding that a judgment creditor could obtain a better title than the defendant himself had, it now follows the doctrine that a judgment creditor acquires no better title than is held by the defendant. If this principal had been applied to the *Zuckerman* case, the results would have been different. This view is consistent with the general rule [11] and with the earlier Colorado decisions.[12]

But the *Zuckerman* case still stands on the books of this state as the law on this subject, though not always followed. Who knows under what circumstances the court may decide to follow it again? It should either be expressly overruled or declared to be the law of this state so that the uncertainty which now exists on this subject would be removed.

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[11] 23 C. J. 745 *et seq.*

[12] Ohio Co. v. Barr, 58 Colo. 116, 144 P. 522 (1914); Copeland v. Bank, 13 Colo. App. 489, 59 P. 70 (1899); Irwin v. Beggs, 24 Colo. App. 158, 132 P. 385 (1913); Hartstock v. Wright, 16 Colo. App. 48, 64 P. 245 (1901).

CURRENT DEVELOPMENTS IN TAXATION

BY ALBERT J. GOULD AND KENNETH L. SMITH
of the Denver Bar

PRESUMPTION OF CORRECTNESS OF COMMISSIONER'S DETERMINATION

In the *Federal National Bank of Shawnee* case, decided in our Tenth Circuit, where a taxpayer had acquired an insurance policy some twenty years previously with other assets of an insolvent bank, the Commissioner contended that the entire proceeds less collection expenses were taxable under Section 22 (b) (2) (A). The taxpayer contended, and the Court of Appeals so held, that the Commissioner should have found either the amount of consideration or cost basis or determined that it was not ascertainable from the taxpayer's records, and that the taxpayer was under no obligation to prove that the Commissioner's action was incorrect. Since the Commissioner's determination was excessive, the Court of Appeals held that the taxpayer did not have to show that he owed no tax or the correct amount of tax which he did owe. The case was remanded to the Tax Court to find the Commissioner's determination invalid unless on a further hearing he offered evidence of the correct amount of the tax owing.

LOANS TO CONTROLLED CORPORATIONS

Bona fide intention and business purpose doctrine gradually has been injected into loan transactions from stockholders to controlled corporations. In *Spreckles,* T. C. Memo, decided Dec. 27, 1949, the court held that a loan by the stockholder to the corporation was deductible as a bad debt and the Tax Court stated that "intention is the controlling factor and where the bona fides is not questioned (as here) the fact that the lender was the sole stockholder and the corporation's business was not prospering are not a basis for disregarding the true intention or the right of the parties to create debts".

In *Wilshire and Western Sandwiches,* 175 F. 2d 718, the Court of Appeals for the Ninth Circuit reversed the Tax Court, looking primarily to the intent of the parties and found that the parties had intended to create a debtor-creditor status between the stockholders and the corporation.

However, in the Eighth Circuit (*Wetterau Grocer Co.,* C.A. 8th, Jan. 17, 1950) it was decided that a corporation was paying dividends and not interest against its socalled debenture notes. The notes had been given to stockholders in exchange for preferred stock which had previously been issued as a dividend on the common stock. The court found that there had been no money borrowed, that the notes had characteristics of preferred stock in that the interest depended upon earnings, that the debentures were non-negotiable and subordinate to general creditors' claims.

In *Lansing Community Hotel Corporation*, 14 T.C. 24, the directors declared a 100% dividend on the par value common stock payable in ten-year debentures, 5% cumulative interest payable only out of surplus, and the debentures were subordinate to creditors. The Commissioner argued that the debentures did not constitute a bona fide obligation and hence the interest was not deductible. The Tax Court held for the taxpayer, with six judges dissenting. Even though there was no borrowing of new money the Tax Court held that it is immaterial that interest was payable only out of income, that there was no discretion to pay or not to pay and that the interest was unqualifiedly payable at maturity. The dissent held there was no indebtedness because the debentures were merely substituted for an equity interest.

REMARKS: The cases in the Courts of Appeals have looked to the business purpose and the *Lansing Community Hotel Corporation* case is obviously slated for review. This line of cases should be watched with interest and all instances of loans to closely-held corporations should be created only where there is a bona fide intention to create an absolute indebtedness.

SALE OF PARTNERSHIP ASSETS

In *Hatch*, 14 T.C. 31, it was held that execution by the copartners transacting business under the firm name, of a bill of sale for certain assets of the partnership was a sale by the partnership. Hence the gain or loss was an ordinary gain or loss, or a capital gain or loss, depending upon the nature of the assets sold, and not a sale of a partnership interest.

REMARKS: A distribution of the assets to the partnership and a sale by them may affect the tax savings.

The Book Trader's Corner

William Histed, Kittredge Bldg., Denver (AC 5801), is optimistically seeking a whole set of Pacific reporters, both first and second series, and the Pacific digest.

Hardly a day goes by that the bar association office does not receive a request for a set of CSA, fondly known to the readers of our footnotes as "Colo. Stat. Ann."

SCHEDULE OF SESSIONS
FOR

CONFERENCE ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR

April 27 to 28, 1950

University of Colorado, Boulder, Colorado

PROGRAM — ANNUAL LAW DAY

April 29, 1950

THURSDAY, APRIL 27

10:00 a.m. Registration—School of Law.

10:30 a.m. Opening Session—East Room, Law Library

1. Address of Welcome—W. F. Doyle, Vice President, University of Colorado.
2. Address—"Preparation for the Legal Profession" —John G. Hervey, Adviser to the Section of Legal Education and Admissions to the Bar, American Bar Association.

1:30 p.m. Conference, East Room, Law Library—"What should be the minimum requirements for admission to the bar?"—Edward C. King, Dean, School of Law, University of Colorado, presiding.

1. Personal character and ability.
   - (a) Ethical standards and awareness of a lawyer's responsibilities to society—Orie L. Phillips, Judge, U. S. Court of Appeals, Tenth Circuit.
   - (b) Knowledge of general principles of law—Stanley H. Johnson, Denver Attorney.
   - (c) Knowledge of local law—Frank F. Dolan, Boulder Attorney.
   - (d) Ability in professional crafts and in use of the English language—Charles J. Beise, Denver Attorney.
   - (e) Student point of view — Henry Hutchinson, Student, School of Law, University of Coloorado.

2. An assured place at the bar.
   Shall there be quantitative limitations as well as qualitative requisites?—James P. Gifford, Associate Dean, School of Law, Columbia University.

8:00 p.m. Conference, East Room, Law Library—"How should the curriculum be constructed to meet the requirements of active practice, of society, and of the bar examinations?"—Wesley A. Sturges, Dean, School of Law, Yale University, presiding.

1. Pre-law educational requirements — Spencer L. Kimball, Assistant Dean, School of Law, University of Utah.
2. Teaching legal method and analysis—Alfred L. Gausewitz, Dean, College of Law, University of New Mexico.
3. Sociological and non-legal courses—Gordon W. Johnston, Dean, College of Law, University of Denver.
4. Teaching the crafts—Robert R. Hamilton, Dean, School of Law, University of Wyoming.
5. Devices for teaching fact finding — Frederic P. Storke, Professor, School of Law, University of Colorado.
6. The place of local law—Clifford Mills, Dean, Westminster Law School.
7. Student point of view — John Wendt, Student, School of Law, University of Colorado.

FRIDAY, APRIL 28

9:00 a.m. Conference, East Room, Law Library—"What method should be used to determine the applicant's educational fitness for admission to the bar?"—James E. Brenner, Professor of Law, Stanford University, and Secretary of the National Conference of Bar Examiners, presiding.

1. Certification by an accredited law school (the diploma privilege)—Dwight Campbell, former Justice, Supreme Court of South Dakota.
2. A uniform national bar examination — L. Dale Coffman, Dean, School of Law, University of California at Los Angeles.
3. Comprehensive examinations at the end of each year in law school under joint sponsorship of state bar and law school deans.—W. H. Robinson, Jr., Denver Attorney.

4. The customary post-graduate bar examination—Fred Farrar, Chairman, Colorado State Board of Law Examiners.
5. Student point of view—Ray Johnson, Student, School of Law, University of Colorado.

1:30 p.m. Conference, East Room, Law Library—"What examination techniques best test legal capabilities?"—Sheldon D. Elliott, Dean, School of Law, University of Southern California, presiding.

1. Selection of questions—Jean Breitenstein, Denver Attorney.
2. Types of questions—Henry Weihofen, Professor, College of Law, University of New Mexico.
3. Criteria of grading—Frank Trelease, Professor, School of Law, University of Wyoming.
4. Testing of character and personality factors—Benjamin E. Sweet, Chairman, Bar Committee, Colorado State Board of Law Examiners.
5. Student point of view—Anthony Williams, Student, School of Law, University of Colorado.

SATURDAY, APRIL 29

ANNUAL LAW DAY

Under joint auspices Boulder County Bar Association and University of Colorado School of Law

9:00 a.m. Registration—School of Law.

10:30 a.m. Convocation—University Theater.

1. Summary of conference discussions and recommendations. Dean Edward C. King, Dean Gordon W. Johnston, Professor James Brenner, Dean Sheldon D. Elliott. Dean Alfred L. Gausewitz, presiding.
2. Address: "The Profession and Legal Education," —Wesley A. Sturges, Dean, School of Law, Yale University.

1:00 p.m. Luncheon—Gold Room, Memorial Building—For all attending Law Day Activities. Tickets $1.00.
Melvin Dinner, President, Student Bar Association, University of Colorado School of Law, presiding.
Presentation of the Dunklee Award — Edward V. Dunklee, Denver Attorney.
Address—Bernard C. Gavit, Dean, School of Law,

University of Indiana, and former President of the Association of the American Law Schools.

2:30 p.m. Recreation.
Attorney-Law Student Golf Tournament, Boulder Country Club Golf Course.
Colorado Relays, Folsom Stadium.
Tennis and swimming facilities of University also available.

3:00 to 5:00 p.m. Tea for ladies attending the conference or accompanying their husbands to Boulder—Residence of Dean and Mrs. Edward C. King, 1001 Baseline Road.

6:30 p.m. Informal banquet honoring senior law students. — Waynes Cafe, 15th and Pearl Streets, Boulder.—For all attending Law Day Activities. Tickets $1.50.
Horace B. Holmes, President, Boulder County Bar Association, presiding.
Announcement of election of members to Order of Coif.
Comments on Conference—Robert L. Stearns, President, University of Colorado.
Address—Albert C. Jacobs, Chancellor, University of Denver.

Advisory Committee, Conference on Legal Education and Admissions to the Bar:

Benjamin C. Hilliard
Chief Justice, Colorado Supreme Court

Orie L. Phillips,
Senior Judge, United States Court of Appeals, Tenth Circuit

William Hedges Robinson, Jr.,
Immediate Past President, Colorado Bar Association

Robert L. Stearns,
President, University of Colorado

Committee on Arrangements:

Horace B. Holmes,
President Boulder County Bar Association

Edward C. King,
Dean, School of Law, University of Colorado

Lawrence W. DeMuth
Clyde O. Martz
Albert R. Menard, Jr.
School of Law, University of Colorado

Bennett Heads Larimer County Bar

At the annual meeting of the Larimer County Bar Association in Ft. Collins, on March 7, the following were named as officers for the ensuing year: Chester A. Bennett of Ft. Collins, president; Conrad Ball of Loveland, vice-president; and William C. Stover of Ft. Collins, secretary-treasurer.